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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 42923
Plaintiff-Respondent,)	
)	TWIN FALLS COUNTY
v.)	NO. CR 2013-7056
)	
SAMUEL C. NEYHART,)	AMENDED APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

AMENDED BRIEF OF APPELLANT

COPY

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

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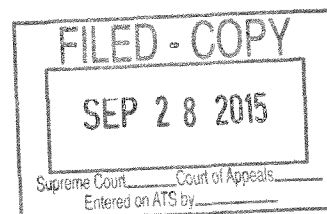


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STATEMENT OF THE CASE

Nature of the Case

A jury found Samuel C. Neyhart guilty of three counts of lewd conduct with a minor under sixteen. Mr. Neyhart asserts that there was insufficient evidence to support the jury's finding that he was guilty of lewd conduct because the State failed to present any evidence that there was genital to genital contact between he and K.S., which was the sole basis of the charges.

Mr. Neyhart also asserts that the district court erred when it permitted the prosecutor, over defense objection, to question him about a supposed "pharmacy record." The prosecutor did not lay any foundation for the document, and the document was hearsay. Further, the prosecutor committed misconduct when she told the jury what the document was and vouched for its credibility, and when she made false statements to the jury about what the document was.

Finally, Mr. Neyhart asserts that his Fifth Amendment rights were violated when the prosecutor commented on his post-arrest and post-*Miranda* silence.

Statement of the Facts and Course of Proceedings

A grand jury issued an Indictment charging Mr. Neyhart with three counts of lewd conduct with a minor. (R., pp.18-20.) All of the acts were allegedly perpetrated against his niece, K.S., when she was between the ages of six and seven years old. (See *generally* Transcript of Grand Jury Hearing held June 26, 2013).¹ Mr. Neyhart pleaded not guilty and the case proceeded to a jury trial. (R., pp.72, 650.)

¹ A transcript of the grand jury proceedings is included as a confidential exhibit in this appeal and can be found in the electronic PDF document titled, "Supreme Court No. 42923 Samuel Neyhart Exhibits."

During the trial, the State presented the testimony of K.S., who described three instances in 2009 and 2010 where she said that she was in Mr. Neyhart's bed, and his "bottom" touched her "bottom." The prosecutor then questioned K.S. about what she called different body parts, and K.S. said that Mr. Neyhart's "bottom" was the place from which he "pee[d] and poop[ed]." (Tr., p.416, L.9 – p.417, L.9, p.418, L.25 – p.419, L.19.)²

K.S. said Mr. Neyhart was wearing a T-shirt and was covered from the waist down with the blanket. (Tr., p.421, Ls.1-24.) She said that she did not look under the covers, and she did not know if he was wearing anything below the waist. (Tr., p.421, L.25 – p.422, L.7.) She said the same thing happened two more times. (Tr., p.424, L.16 – p.432, L.8.) She never saw what was touching her and did not know if what was touching her was soft or hard. (Tr., p.430, Ls.3-12.) K.S. said that during the second incident, Mr. Neyhart "peed in [her] pants" because her pants were wet. (Tr., p.439, Ls.6-16.)

The jury also heard recordings of K.S.'s prior statements. During the 2010 CARES Interview, K.S. stated that Mr. Neyhart touched her with "[h]is bottom. I don't know which part...It felt like his whole bottom." (Exhibit 13 at 14:14:25 to 14:14:35.) In a 2012 interview with law enforcement, K.S. stated that Mr. Neyhart touched her with his "private." (Exhibit 18 at 10:10.)

Rylene Nowlin, a forensic scientist with the Idaho State Police, said she tested a pair of pink underwear, and the underwear had semen on the front that was a DNA match for Mr. Neyhart. (Tr., p.505, Ls.2-7, p.590, Ls.6-18.) Kimberly Snyder, K.S.'s

² Transcript citations refer to the trial transcript unless otherwise indicated.

mother, said she found the pink underwear³ in her laundry room and the underwear belonged to K.S. (Tr., p.368, Ls.1-19.) However, Heidi Neyhart, Mr. Neyhart's wife, said the pink underwear actually belonged to her, and not to K.S. (Tr., p.612, Ls.9-14.) Blenda Neyhart, Mr. Neyhart's mother, said that a few days after Mr. Neyhart took K.S. to the pumpkin patch she saw Rebecca Wright, Mr. Neyhart's sister-in-law, sneak out of Mr. Neyhart's trailer holding a camera and a rolled-up pair of underwear. (Tr., p.677, L.13 – p.679, L.15.)

Heidi Neyhart testified that on October 28, 2010, the day before K.S. went to the pumpkin patch with Mr. Neyhart, K.S. complained that her bottom was red and sore. (Tr., p.605, L.6 – p.606, L.21.) When Heidi took K.S. to the bathroom and looked at her genitals, she saw that K.S. genitals were red and sore, and there was a bit of blood. (Tr., p.607, Ls.4-13.) Heidi also said that she had seen Kimberly and her husband discipline K.S. at church by grabbing her thigh area. (Tr., p.610, L.24 – p.611, L.21.)

Kimberly said on October 31, 2010, two days after K.S. went to the pumpkin patch with Mr. Neyhart, she saw bruises on K.S.'s legs and K.S.'s vagina was red. (Tr., p.339, L.3 - p.349, L.14.) Dr. Kathryn Reese, the doctor who examined K.S. on November 2, 2010, said that she saw some bruising on the upper part of her thighs. (Tr., p.559, Ls.10-12.) She said that K.S.'s labia and hymen were normal, and there was no bruising on K.S.'s vagina. (Tr., p.559, Ls.8-9.)

Mr. Neyhart took the stand in his own defense and maintained that he did not in any way sexually touch his niece.⁴ (Tr., p.721, L.24 – p.722, L.1.) During the State's

³ The pink underwear was introduced into evidence as Exhibit 3. A photograph of the underwear, along with other clothing, was admitted as Exhibit 7.

⁴ Several other witnesses testified at trial including Jamie Femreite (forensic scientist who prepared the DNA packet), Amber Gill (family friend who testified about the cleanliness of K.S.'s house), and police officers (who interviewed various witnesses or

cross-examination of Mr. Neyhart, the State asked Mr. Neyhart why he did not tell the police that the pink underwear belonged to his wife and not to K.S. (Tr., p.769, Ls.3-13, p.788, L.13 – p.791, L.24, p.792, Ls.12-15.) Mr. Neyhart repeatedly responded that he had asserted his right to remain silent and his right to counsel, and that was why he did not give an additional statement to the police. (Tr., p.769, Ls.3-13, p.788, L.13 – p.791, L.24.)

In his initial 2010 police interview, prior to his determination that the underwear belonged to his wife, Mr. Neyhart speculated that he may have been suffering from semen leakage because he was taking a medication called Cymbalta. (Tr., p.772, Ls.23-25.) At trial, during the State's cross-examination of Mr. Neyhart, the prosecutor asked Mr. Neyhart if he told Detective White that he was taking Cymbalta at the time of the alleged incidents with K.S. (Tr., p.771, Ls.8-20.) Mr. Neyhart said that he did. (Tr., p.771, Ls.7-8.) The prosecutor asked if Mr. Neyhart's pharmacy record would refresh his memory about what medication he was on. (Tr., p.771, Ls.12-15.) Defense counsel objected on the basis of assuming facts not in evidence, a discovery violation because he had never been provided with the document, and the fact that the document had not been admitted. (Tr., p.772, Ls.1-5.) The State responded, "It's not – I'm refreshing his memory. I'm not admitting it, Your Honor." (Tr., p.772, Ls.6-8.) The district court overruled the objection. (Tr., p.772, Ls.9-11.)

prepared interview recordings). (*See generally*, Tr.). These witnesses, who with the exception of Ms. Gill, were witnesses for the State, provided evidence that can best be described as foundational or cumulative and did not provide any additional substantive information. *Id.* None of these witnesses were either alleged to have, or claimed to have, seen any inappropriate or sexual contact between Mr. Neyhart and K.S.; therefore, the specifics of their testimony will not be presented in detail in this brief.

The prosecutor handed the document to Mr. Neyhart and told him that it was his prescription record. (Tr., p.773, Ls.5-6.) Defense counsel objected on the basis of assuming facts not in evidence and hearsay. (Tr., p.773, Ls.7-16.) The district court never ruled on the objection, and the prosecutor told Mr. Neyhart that the document showed his prescription history. (Tr., p.773, L.17 – p.774, L.21.) She then asked Mr. Neyhart, “What does it say you were taking?” (Tr., p.775, L.6.) Defense counsel objected again on hearsay grounds. (Tr., p.775, Ls.7-8.) The district court overruled the objection and said, “It’s not for the truth in [sic] anyway. It’s impeachment.” (Tr., p.775, Ls.12-13.) The prosecutor then asked Mr. Neyhart to read the document, and Mr. Neyhart read three prescriptions for pain medication. (Tr., p.775, L.14 – p.776, L.7.) Mr. Neyhart maintained that he was using Cymbalta during the time frame in question and that the record was inaccurate because it only showed controlled substances and not all of his prescriptions. (Tr., p.776, Ls.13-14, p.776, Ls.19-24.) The prosecutor told Mr. Neyhart, and the jury, that her office got the record from the pharmacy board and it was accurate. (Tr., p.776, Ls.15-24.)

A jury found Mr. Neyhart guilty of all three counts. (R., pp.694-95.) Mr. Neyhart filed a Motion for New Trial/Mistrial. (R., pp.706-711, 785-94, 804-06, 815-22, 887-95.) Following a hearing, the district court denied the motions.⁵ (R., pp.934-57.)

Mr. Neyhart filed a timely Notice of Appeal from the Judgment of Conviction. (R., p.994.)

⁵ Mr. Neyhart is not challenging the district court's denial of his Motion for New Trial/Mistrial on appeal; however, several of the issues raised in his Motion for New Trial/Mistrial have also been raised in this brief as trial errors.

ISSUES

1. Should this Court vacate Mr. Neyhart's convictions for lewd conduct with a minor because there was insufficient evidence to support the convictions?
2. Did the prosecutor commit misconduct, rising to the level of a fundamental error, when she commented at trial and in closing argument on Mr. Neyhart's silence?
3. Did the district court err when it allowed the prosecution to impeach Mr. Neyhart with an inadmissible hearsay document for which no foundation was laid?
4. Did the prosecutor commit misconduct when she used an inadmissible hearsay document to impeach Mr. Neyhart and told the jury inaccurate information about what the document was?

ARGUMENT

I.

This Court Should Vacate Mr. Neyhart's Convictions For Lewd Conduct With A Minor Because There Was Insufficient Evidence To Support The Convictions

A. Introduction

In Idaho Code section 18-1508, the Idaho legislature described the types of contacts that can amount to lewd contact with a minor. Although not an exhaustive list, the statute lists the following: genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact. I.C. § 18-1508. Mr. Neyhart was alleged to have violated this statute by having genital-genital contact with K.S. In order to sustain a conviction for lewd conduct by genital-genital contact, the State was required to prove that Mr. Neyhart's genitals, and not some other part of his body, touched K.S.'s genitals. Mr. Neyhart asserts that the State failed to present sufficient evidence that genital-genital contact occurred; therefore, there was insufficient evidence to support his convictions.

B. A Conviction Founded Upon Insufficient Evidence Violates A Defendant's Right To Due Process Of Law And Must Be Vacated

The Fourteenth Amendment to the United States Constitution prohibits the State of Idaho from depriving "any person of life, liberty, or property without due process of law." U.S. Const. Amd. XIV. "Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) (quoting *De Jonge v. State of Oregon*, 299 U.S. 353, 362 (1937) (additional citations omitted).) "It is axiomatic that a conviction upon a charge not made or upon a

charge not tried constitutes a denial of due process.” *Jackson v. Virginia*, 433 U.S. 307, 314 (1979) (citations omitted).

The sufficiency of the evidence presented to sustain a conviction can be raised for the first time on appeal. *State v. Faught*, 127 Idaho 873, 877-78 (1995). “Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt.” *State v. Warburton*, 145 Idaho 760, 761-62 (Ct. App. 2008).

C. A Violation Of I.C. § 18-1508 Under A Genital-Genital Contact Theory Required The State To Prove Mr. Neyhart’s Genitals Touched K.S.’s Genitals

Idaho Code § 18-1508 reads as follows:

Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, **genital-genital contact**, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of bestiality or sado-masochism as defined in section 18-1507, Idaho Code, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life.

I.C. § 18-1508 (emphasis added). The Indictment specifically charged Mr. Neyhart with lewd conduct with K.S. by genital-genital contact. (R., p.18.) It follows that the State was therefore required to prove genital-genital contact.

D. The State Presented Insufficient Evidence To Sustain A Jury Finding That Mr. Neyhart Had Genital-Genital Contact With K.S.

Based on the testimony, it appears that K.S. was familiar with female anatomy, and she calls her crotch and buttocks her “bottom” and “backside” respectively. (Tr., p.416, Ls.9-18.) However, when discussing Mr. Neyhart’s anatomy, K.S. could not distinguish between his genitalia and his buttocks or anus. The prosecutor and K.S. had the following exchange:

Q: And what did you do after that?

A: He messed with me.

Q: What do you – what do you mean by “messed?”

A: He messed with my bottom.

Q: And what did he do to your bottom?

A: He messed with it.

Q: Did he pinch it?

A: No.

Q: Did he spank it?

A: No.

Q: What touched – what touched your bottom to be messed with?

A: His bottom.

Q: And is – what does he do with his bottom?

A: He pushed against it.

Q: So on Sam, his bottom, what does his bottom do when he goes to the bathroom?

A: Pee and poop.

(Tr., p.418, L.25 – p.419, L.19.)

In sum, K.S.'s testimony was that Mr. Neyhart's "bottom" touched her, and his "bottom" is the body part from which he "pee[s] and poop[s]." As such, K.S. did not demonstrate that she could distinguish between male genitalia and the buttocks or anus.

Further, even if K.S. could distinguish between the male genitalia and buttocks, she could not state what actually touched her. K.S. said she never saw what was touching her and did not know if what was touching her was soft or hard. (Tr., p.430, Ls.3-12.) During the 2010 CARES Interview, K.S. stated that Mr. Neyhart touched her with "[h]is bottom. I don't know which part...It felt like his whole bottom." (Exhibit 13 at 14:14:25 to 14:14:35.) In a 2012 interview with law enforcement, K.S. stated that Mr. Neyhart touched her with his "private." (Exhibit 18 at 10:10.) There is never any clarification of what K.S. meant when she used the word "private." At trial, K.S. testified that something touched her and she thought that something was Mr. Neyhart's "bottom" because it felt "strange." (Tr., p.430, Ls.3-12.)

Assuming that K.S.'s testimony is true that Mr. Neyhart caused the bruises on her legs and touched her genitalia, there is still no evidence that he touched her genitalia *with his genitalia*. Even if K.S. was referring to male genitalia when she used the word "bottom," her testimony is insufficient to establish that Mr. Neyhart's "bottom" ever touched her because she did not see what touched her and could not describe what touched her. It could have been Mr. Neyhart's hip, his outer thigh, or his stomach. K.S. also said that during the second incident, Mr. Neyhart "peed in [her] pants" because her pants were wet. (Tr., p.439, Ls.6-16.) However, even assuming this wetness came from Mr. Neyhart, genital-genital contact is not required for Mr. Neyhart to have discharged a liquid. The jury simply speculated that Mr. Neyhart's genitalia

touched K.S.'s genitalia. Therefore, Mr. Neyhart asserts that there was insufficient evidence to support the jury's verdict.

II.

The Prosecutor Committed Misconduct, Rising To The Level Of A Fundamental Error, When She Commented At Trial And In Closing Argument On Mr. Neyhart's Silence

A. Introduction

Mr. Neyhart asserts that the prosecutor committed misconduct, rising to the level of a fundamental error, when she repeatedly commented on his in-custody and post-*Miranda*⁶ silence for the sole purpose of implying guilty.

B. Standard Of Review

Because Mr. Neyhart's prosecutorial misconduct claims are grounded in constitutional principles, they involve questions of law over which this Court exercises free review. *City of Boise v. Frazier*, 143 Idaho 1, 2 (2006).

C. Mr. Neyhart's Fifth And Fourteenth Amendment Rights Were Violated When The Prosecutor Commented On His Silence For The Sole Purpose Of Implying Guilt

Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, as well as Article I, § 13 of the Idaho Constitution, no person shall be compelled, in any criminal case, to be a witness against himself. Not only do suspects have a right to remain silent though; they also have a right not to have their silence used against them at trial. See *Doyle v. Ohio*, 426 U.S. 610, 617-19 (1976) (holding that a defendant who testifies in his own defense cannot be cross-examined about his post-arrest silence). Therefore, "it is clearly erroneous for a prosecutor to introduce evidence

⁶ *Miranda v. Arizona*, 384 U.S. 436 (1966).

of the defendant's post arrest silence for the purpose of raising an inference of guilt.” *State v. Hodges*, 105 Idaho 588, 591 (1983) (citing *State v. White*, 97 Idaho 708, 715 (1976)).

The Idaho Supreme Court has further held that a defendant's Fifth Amendment right not to have their silence used to imply guilt is applicable if the defendant was in custody at the time of questioning even if he was not under arrest and did not receive Miranda warnings. *State v. Ellington*, 151 Idaho 53, 60 (2011); *State v. Moore*, 131 Idaho 814, 820–21 (1998). Here, Mr. Neyhart's 2010 interview occurred while he was in custody, and his 2013 interview with Detective Joslin occurred after Detective Joslin read him his *Miranda* rights. (See Exhibits 9, 10A, 12.) Therefore, as discussed in detail below, his right to silence was protected. However, throughout the trial, the prosecutor repeatedly questioned Mr. Neyhart about why he did not give certain information to the police during and after both interviews.

Prior to Mr. Neyhart's testimony, Heidi Neyhart testified that on October 28, 2010, the day before K.S. went to the pumpkin patch with Mr. Neyhart, K.S. complained that her bottom was red and sore. (Tr., p.605, L.6 – p.606, L.21.) When Heidi took K.S. to the bathroom and looked at her genitals, she saw that K.S. genitals were red and sore, and there was a bit of blood. (Tr., p.607, Ls.4-13.) On cross-examination of Mr. Neyhart, the prosecutor questioned Mr. Neyhart about why he did not give that information to the police:

PROSECUTOR: You didn't give [Detective White] that statement, did you?

NEYHART: I did not. I'd asked for an attorney and made a determination that we were not going to be speaking with them short of an attorney at that point and was not making any further statements.

PROSECUTOR: Well, that's talking to officers. Don't you think it's important for the investigation for the officer to find out about that?

(Tr., p.769, Ls.3-13.)

The prosecutor then questioned Mr. Neyhart about why he did not tell law enforcement that the pink underwear belonged to his wife:

PROSECUTOR: And when your mother told you that Becca had supposedly stolen you – Heidi's underwear, you didn't tell that to law enforcement, did you?

NEYHART: I had no further contact with law enforcement after Detective Duch –

PROSECUTOR: Duch.

NEYHART: -- Duch, got up in my face and was yelling and screaming. I decided I wanted an attorney and would say nothing further without an attorney.

PROSECUTOR: That makes or breaks your case, doesn't it, where that semen came from, doesn't it?

DEFENSE: Objection. Speculation.

THE COURT: Sustained.

PROSECUTOR: It's important where that semen came – whose underwear that was; isn't that really, really important in this case?

NEYHART: I would assume so.

PROSECUTOR: But not important enough for you to pass that information on in 2010; correct?

NEYHART: I assumed there was more sophisticated DNA that would give more information. And I – I was not talking to an attorney. I mean, I was not talking to detectives unless there was an attorney present.

PROSECUTOR: And you didn't give that information in 2011, did you?

NEYHART: I was not questioned in 2011.

PROSECUTOR: You didn't give that information in 2012, did you?

NEYHART: No. I did not volunteer anything. I was waiting to talk to an attorney.

PROSECUTOR: But you knew this was an ongoing case, didn't you?

NEYHART: Actually, the case was moved to inactive for a period of time, and so we were waiting to see what was going on.

PROSECUTOR: And you know that because you were keeping track of that case, weren't you?

NEYHART: Somewhat, yes.

PROSECUTOR: So it's an important bit of information, when you go in to talk to Detective Joslin in 2013, isn't it?

NEYHART: I still was not making any major statements until I talked to an attorney.

PROSECUTOR: And that's because you wanted to wait until today, spend all that money on an attorney, and come in and testify; is that why you didn't tell anyone?

NEYHART: No. Detective Duch had gotten up in my face and yelled and screamed. I was not having anything to do with him.

PROSECUTOR: Detective Duch didn't interview you in 2013, did he?

NEYHART: I was having nothing more to do with any of them.

PROSECUTOR: And when you were indicted, you didn't tell the police that that was your wife's underwear, did you?

NEYHART: I wasn't at the indictment, Ma'am.

PROSECUTOR: You knew you were indicted, didn't you? In fact, you had to come in because you had been arrested, hadn't you?

NEYHART: I found that – I found it on, the warrants, on the website and came in and turned myself in, yes.

PROSECUTOR: And so you knew the case was opened again, didn't you?

NEYHART: Yes.

PROSECUTOR: And that would be something important to tell the authorities in 2013, wouldn't it?

NEYHART: That would be something important to tell my attorney.

PROSECUTOR: But your attorney didn't bother to tell law enforcement, did he?

NEYHART: I have –

DEFENSE: Objection. Foundation. Speculation.

THE COURT: Sustained.

PROSECUTOR: And so you waited until we got to trial before you told anybody, correct?

NEYHART: I told my attorney.

(Tr., p.788, L.13 – p.791, L.24.)

PROSECUTOR: Well, it's interesting that you – I guess – I mean, I guess I'm asking you why you waited from 2010 to 2014 to tell that to anybody?

(Tr., p.792, Ls.12-15.) In sum, the prosecutor commented on three instances where Mr. Neyhart exercised his right to remain silent. First, she asked Mr. Neyhart why he did not tell Detective White about Heidi's observations of K.S.'s vagina. Second, she asked why Mr. Neyhart did not tell Detective White or Detective Duch that the pink underwear belonged to Heidi. Third, she asked why Mr. Neyhart did not tell Detective Joslin that the pink underwear belonged to Heidi.

Regarding the 2010 interview, Mr. Neyhart was in custody when he was interrogated by Detective White and Detective Duch and, therefore, his silence could not be used against him. When determining whether a person is in custody, a court must consider all of the circumstances surrounding the interrogation. *Stansbury v.*

California, 511 U.S. 318, 322 (1994). This generally involves a consideration of whether the circumstances surrounding the interrogation have created a “police-dominated atmosphere,” and whether the circumstances involve the type of “ ‘inherently compelling pressures’ that are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station.” *State v. Silver*, 155 Idaho 29, 32 (Ct. App. 2013) (internal citations omitted). “Specific factors to be considered may include the degree of restraint on the person’s freedom of movement including whether the person is placed in handcuffs, whether the subject is informed that the detention is more than temporary, the location and visibility of the interrogation, whether other persons were present, the number of questions asked, the duration of the interrogation or detention, the time of the interrogation, the number of officers present, the number of officers involved in the interrogation, the conduct of the officers, and the nature and manner of the questioning.” *Id.*

Here, Mr. Neyhart was questioned for four hours. (Tr., p.245, Ls.15-17.) He was interrogated by two separate officers, and the nature of the questioning by Detective Duch was aggressive (e.g., Detective Duch repeatedly told Mr. Neyhart to “man up” and told Mr. Neyhart that he ruined a girl’s life and that he didn’t “have the balls” to admit it). (Exhibit A at 1:00:00 - 1:05:20.) In response to this questioning, Mr. Neyhart said that he didn’t know what else to do other than to wait for an attorney. (Exhibit A at 1:05:30 - 1:05:43). Detective Duch told Mr. Neyhart he had not been charged yet, and continued questioning him. (Exhibit A at 1:05:43 – 1:06:02.) Mr. Neyhart said again that he wanted to wait for an attorney, and Detective Duch continued to interrogate him. (Exhibit A at 1:06:27). Mr. Neyhart then said, for a third time, that he wanted to wait for an attorney. (Exhibit A at 1:06:57). The interrogation continued. (Exhibit A at 1:07:08).

Mr. Neyhart said for a fourth time that he wanted to wait for an attorney. (Exhibit A at 1:07:32). Detective Duch raised his voice, continued to interrogate Mr. Neyhart, and asked him if he was a psychopath or a sociopath. (Exhibit A at 1:07:46 – 1:08:02). For a fifth time, Mr. Neyhart said he was going to wait for an attorney. (Exhibit A at 1:08:07). Detective Duch told Mr. Neyhart to man up and cursed at him, and Mr. Neyhart said for a sixth and seventh time that he was going to wait for an attorney. (Exhibit A at 1:08:24.) Detective Duch responded, “You’re a fucking lowlife” and continued to berate Mr. Neyhart because he would not “man up.” (Exhibit A at 1:08:31.) Given the location of the interview, the presence of multiple officers, and the aggressive and berating questioning of Detective Duch, Mr. Neyhart asserts that he was in custody and, therefore, the prosecutor could not comment at trial on his in-custody silence.

Regarding the 2013 interview, Detective Joslin began the interview by reading Mr. Neyhart his *Miranda* rights (Exhibit 12 at 0:1:30) and, therefore, a custody analysis is not required because a comment on Mr. Neyhart’s silence during that interview would constitute a comment on post-*Miranda* silence.

In *Moore*, the Court stated that the constitutional right against self-incrimination applies only when the silence is used solely for the purpose of implying guilt. *Moore*, 131 Idaho at 821. Here, the prosecutor used Mr. Neyhart’s silence solely to imply guilt. Mr. Neyhart’s defense at trial was that he did not cause the redness on K.S.’s vagina because his wife saw the redness before he and K.S. were together, and that the underwear on which his semen was found belonged to his wife and not to K.S. The prosecutor repeatedly implied that Mr. Neyhart fabricated his testimony because he did not give the information to law enforcement earlier. Further, the prosecutor used Mr. Neyhart’s silence during her closing to imply guilt and said that it was unreasonable

for Mr. Neyhart to wait for years to tell anyone that the underwear belonged to his wife. (Tr., p.848, Ls.8-12, p.878, Ls.1-9.)

In cases where the defendant fails to object to prosecutorial misconduct at trial, this Court will review the alleged error for whether the misconduct alleged rises to the level of a fundamental error. *State v. Perry*, 150 Idaho 209, 226 (2010). This Court applies a three-step process of review. First, the defendant must demonstrate that one or more of his unwaived constitutional rights were violated. *Id.* Second, the error must be clear and obvious from the record without the need for additional information not contained within the record on appeal. *Id.* Finally, the defendant must show the error affected the defendant's substantial rights. *Id.* As to this last prong, the defendant must show a reasonable possibility that the error complained of affected the outcome of the trial. *Id.*

Here, the prosecutor's comments on Mr. Neyhart's silence implicated his Fifth and Fourteenth Amendment rights. These due process violations are apparent from the face of the record and are clear violations of well-established law. Accordingly, there is every reason to believe the prosecutor's improper argument affected the outcome in this case. This was essentially a he-said/she-said case, and Mr. Neyhart maintained his innocence from the beginning. He presented testimony that called into question the State's physical evidence. Therefore, credibility was a very important part of the case. The State's improper comments on his silence could have led the jury to believe, as the prosecutor implied, that Mr. Neyhart was guilty because, if he were telling the truth, he would have told the police sooner.

Mr. Neyhart asserts that the prosecutor improperly commented on his in-custody and post-*Miranda* silence, and the error was not harmless. Consequently, this Court should vacate his convictions.

III.

The District Court Erred When It Allowed The Prosecution To Impeach Mr. Neyhart With An Inadmissible Hearsay Document For Which No Foundation Was Laid

A. Introduction

During cross-examination, the State presented Mr. Neyhart with a document that the prosecutor stated was his “pharmacy record.” (Exhibit 23, not admitted). The prosecutor did not lay any foundation for the document, and no witness ever testified as to what the document was. The prosecutor sought to use the document to impeach Mr. Neyhart’s statement that he was using the medication Cymbalta at the time of the alleged incidents. Defense counsel objected that the document was hearsay and, when the prosecutor told the jury what the document was, objected on the basis of assuming facts not in evidence.

B. Standard Of Review

Idaho Appellate Courts review trial court decisions admitting or excluding evidence under the abuse of discretion standard. *State v. Thompson*, 132 Idaho 628, 634 (1999).

C. The District Court Erred When It Allowed The Prosecution To Impeach Mr. Neyhart With A Document That Was Not Admitted And Was Hearsay

In his initial police interview, prior to his determination that the underwear belonged to his wife, Mr. Neyhart speculated that he may have been suffering from

semen leakage because he was taking a medication called Cymbalta, and that was how his DNA ended up on the underwear. (Tr., p.772, Ls.23-25.) This was not his defense at trial; his defense was that the underwear in question belonged to his wife and not K.S. and that was why it had his DNA on it.

At trial, during the State's cross-examination of Mr. Neyhart, the prosecutor asked Mr. Neyhart if he told Detective White that he was taking Cymbalta. (Tr., p.771, Ls.8-20.) Mr. Neyhart said that he did. (Tr., p.771, Ls.7-8.) The State asked if Mr. Neyhart's pharmacy record would refresh his memory about what medication he was on. (Tr., p.771, Ls.12-15.) Defense counsel objected on the basis of assuming facts not in evidence, a discovery violation because he had never been provided with the document, and the fact that the document had not been admitted. (Tr., p.772, Ls.1-5.) The State responded, "It's not – I'm refreshing his memory. I'm not admitting it, Your Honor." (Tr., p.772, Ls.6-8.) The district court overruled the objection. (Tr., p.772, Ls.9-11.)

Two items of foundation must be laid before a witness may refer to notes or to other materials to refresh his or her memory. First, the witness must exhibit the need to refresh his or her memory and, second, the witness must confirm that the document will assist in refreshing his or her memory. *Baker v. Boren*, 129 Idaho 885, 892 (Ct. App. 1997). Further, the witness may not testify directly from the document, but can use it to assist in recollection. *Id.* Here, Mr. Neyhart did not have any difficulty with his memory; his answer was simply not the one that the persecutor wanted. Absolutely no foundation was laid for refreshing Mr. Neyhart's memory and, therefore, the district court erred when it permitted the State to use the document to refresh Mr. Neyhart's memory.

The prosecutor then attempted to use the document to impeach Mr. Neyhart. As an initial matter, “a witness may not be impeached upon any immaterial matter.” *State v. Farmer*, 34 Idaho 370 (1921); *State v. Bush*, 50 Idaho 166 (1930). Whether or not Mr. Neyhart was on Cymbalta was immaterial because his defense at trial was that the underwear did not belong to K.S. and, therefore, whether being on Cymbalta was causing him to leak semen was irrelevant because he admitted that his semen would have been on his wife's underwear.

However, the prosecutor was clearly trying to use the document to prove that Mr. Neyhart lied about being on Cymbalta. She handed him the document and said, “So this is your prescription record up to December.”⁷ Defense counsel objected that the prosecutor was assuming facts not in evidence. (Tr., p.773, Ls.7-10.) The State said, “The reason we’re referring this document is because it’s the time at which he said he was making medicine – he was taking medicine. It includes the time that we’re talking about.” (Tr., p.773, Ls.17-21.) The district court never explicitly ruled on defense counsel’s objection but, allowed the prosecutor’s improper exchange to proceed. The State then repeatedly stated that the document contained all of Mr. Neyhart’s prescriptions and said, “What does it say you were taking?” (Tr., p.775, L.6.) Defense counsel objected that the document was hearsay. (Tr., p.775, Ls.7-8.) The district court overruled the objection. (Tr., p.775, L.9.) The prosecutor stated that she was refreshing [Mr. Neyhart’s] memory. (Tr., p.775, Ls.10-11.) The court stated, “It’s not for the truth in [sic] anyway. It’s impeachment.” (Tr., p.775, Ls.12-13.) As

⁷ The prosecutor’s misconduct in laying the foundation for the document with her own testimony will be addressed below.

such, the district court acknowledged that the document was not being used to refresh Mr. Neyhart's memory, but was being used to impeach him.

The prosecutor did not lay any foundation as to what the document was and, therefore, could not use it for impeachment. The only information about what the document was came from the prosecutor's own improper statements. The State cannot impeach Mr. Neyhart with a blank piece of paper. Without the prosecutor's testimony, that is all Exhibit 23 was.

Further, as to defense counsel's hearsay objection, the "truth" at issue was whether or not Mr. Neyhart was on Cymbalta. Mr. Neyhart testified that he was on Cymbalta. The document was offered to show that Mr. Neyhart was not on Cymbalta. It was, therefore, offered for the truth of the matter asserted, i.e., whether or not Mr. Neyhart was on Cymbalta. Even if the proper foundation had been laid, the document was hearsay because it was offered as substantive evidence that Mr. Neyhart was not taking Cymbalta. Therefore, the district court also erred when it overruled defense counsel's hearsay objection.

IV.

The Prosecutor Committed Misconduct When She Used An Inadmissible Hearsay Document To Impeach Mr. Neyhart And Told The Jury Inaccurate Information About What The Document Was

The prosecutor committed misconduct by laying the foundation for a piece of evidence with her own testimony. Defense counsel repeatedly objected to the prosecutor's statements based on assuming facts not in evidence. This objection, although applicable, was generous to the prosecution. The prosecutor was not simply assuming facts not in evidence; she was *providing* the facts that were not in evidence.

The prosecutor handed the document to Mr. Neyhart and told him that it was his prescription record. (Tr., p.773, Ls.5-6.) Defense counsel again objected that the prosecutor was assuming facts not in evidence and that the document was hearsay. (Tr., p.773, Ls.7-16.) The district court never ruled on defense counsel's objection, and the prosecutor simply kept announcing what the document was and what information was contained in the document. (Tr., p.773, L.17 – p.774, L.21.) She then asked Mr. Neyhart, "What does it say you were taking?" (Tr., p.775, L.6.) Defense counsel objected again on hearsay grounds. (Tr., p.775, Ls.7-8.) The district court overruled the objection. (Tr., p.775, L.9. The prosecutor asked Mr. Neyhart to read the document. (Tr., p.775, L.14 – p.776, L.7.) Mr. Neyhart maintained that he was on Cymbalta and that the record was inaccurate. (Tr., p.776, Ls.13-14.) The following exchange then occurred:

PROSECUTOR: That was accurate as of, I suppose – I mean, you get it from the pharmacy board. They would send it to us. Do you think they would get it right?

NEYHART: This is a pharmacy board report?

PROSECUTOR: Yes, it is.

NEYHART: So you know that only narcotics go on there; right?

PROSECUTOR: No. That's not true. Are you an expert? Do you know that?

NEYHART: I have printed off my medical record for this time period.

PROSECUTOR: And that's the one we did in 2010. So Wal-Mart got it wrong, I guess?

NEYHART: Apparently. You're welcome to call them and get it.

(Tr., p.776, L.15 – p.777, L.5.)

In sum, the prosecutor handed Mr. Neyhart a piece of paper. The piece of paper was never introduced into evidence, and no foundation was laid for what it actually was. The prosecutor then stated that the piece of paper was, in fact, a pharmacy board record and that it was accurate. When Mr. Neyhart said the record was inaccurate, she berated him and demanded to know whether he was an expert. The prosecutor used her position of authority to present improper evidence to the jury that otherwise should not have been considered. See *State v. Irwin*, 9 Idaho 35, 44, 71 P. 608, 611 (1903).

The prosecutor also committed misconduct by impeaching Mr. Neyhart with a document that she knew or should have known was inaccurate. Exhibit 23 is not Mr. Neyhart's complete Walmart pharmacy record, and the prosecutor knew or should have known that because the document itself states that it is a "Patient Profile Report" provided in accordance with Idaho Code section 37-2730A. Section 37-2730A states:

PRESCRIPTION TRACKING PROGRAM. (1) The board shall maintain a program **to track the prescriptions for controlled substances** that are filed with the board under section 37-2726, Idaho Code, for the purpose of assisting in identifying illegal activity related to the dispensing of controlled substances and for the purpose of assisting the board in providing information to patients, practitioners and pharmacists to assist in avoiding inappropriate use of controlled substances. The tracking program and any data created thereby shall be administered by the board.

Idaho Code § 37-2730A (emphasis added).

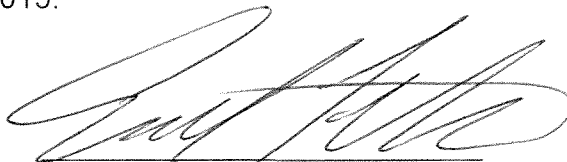
The document was exactly what Mr. Neyhart said it was: a record of controlled substances that he had been prescribed. Therefore, not only did the prosecutor improperly testify to the jury about what the document was and vouch for its accuracy, she provided false testimony. At best, the prosecutor did not read her own document and committed prosecutorial misconduct by misleading the jury about what the document was. At worst, she did read her own document, was aware that it did not show Mr. Neyhart's non-narcotic prescriptions, and intentionally committed fraud on the

court. Regardless, her misconduct deprived Mr. Neyhart of his right to a fair trial, and he asks that this Court vacate his conviction.

CONCLUSION

Mr. Neyhart respectfully requests that this Court reverse his convictions and order acquittals on all counts. Alternatively, he requests that this Court vacate his convictions and remand his case for a new trial.

DATED this 22nd day of September, 2015.

A handwritten signature in black ink, appearing to read 'Erik R. Lehtinen', written over a horizontal line.

ERIK R. LEHTINEN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of September, 2015, I served a true and correct copy of the foregoing AMENDED APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

SAMUEL C NEYHART
INMATE #112028
ISCI
PO BOX 14
BOISE ID 83707

G RICHARD BEVAN
DISTRICT COURT JUDGE
E-MAILED BRIEF

DANIEL BROWN
ATTORNEY AT LAW
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
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PO BOX 83720
BOISE ID 83720-0010

Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read 'Evan A. Smith', with a long horizontal flourish extending to the right.

EVAN A. SMITH
Administrative Assistant

KES/eas